SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-629

JUAN ISIDRO VALDEZ; TOMAS GALLEGOS; VENTURA CHAVEZ; MARIA MADRIL, individually and as the next friend of MERCEDES MADRIL, CORDELIA MADRIL, and DESI MADRIL; ROSARITO GARCIA, by her next friend ISABEL GARCIA; MARINO MOYA; JOE W. PADILLA; FILOMENA VALDEZ, individually and as the next friend of ELIZARDO VALDEZ,

Petitioners,

—v.—

JOE BLACK, Chief of the New Mexico State Police; JOHN JOLLY, Adjutant General and Commander of the New Mexico National Guard; ALFONSO SANCHEZ, District Attorney for the First Judicial District of New Mexico; CARLOS JARAMILLO, JUAN SANTISTEVAN, LIONAL RODELA, FRED MARTINEZ, TOMMY HOLDER, HOOVER WIMBERLY, T. J. CHAVEZ, MARTIN VIGIL, MONROE ALEXANDER, ALBERT WHITEHOUSE, RUBEN GOMEZ, GILBERT A. SILVA, MAX WATSON, BRUCE GLASCO, Members of the New Mexico State Police; and WILLIAM A. OAKLEY, and JOE L. SANCHEZ, Members of the New Mexico National Guard,

Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This brief is in reply to the brief in opposition to certiorari filed by the Respondent John Jolly, Adjutant General and Commander of the New Mexico National Guard.

The petitioners urged that certiorari be granted *inter alia* to determine whether members of the National Guard, called out to assist civilian law enforcement officials, are immune from liability for arrests made without probable cause. Respondent Jolly opposes certiorari, contending that the issue raised is moot. The argument is that since

the National Guard acted pursuant to the control of the state police, and the jury found that the state police acted with probable cause, then the National Guard is implicitly embraced within that verdict, notwithstanding the judge's charge that the Guard Commander could act on substantially less than probable cause.

First, there is little doubt that the charge to the jury embodied a sharp and fundamental distinction between the authority of the Guard to detain persons "in good faith and in the honest belief that" such detention was necessary to preserve peace, Pet. for Certiorari, p. 8a, and the requirement that civilian police officers must have probable cause in order to arrest and detain (T. 1546-51). The court of appeals clearly understood this distinction to have been a central element of the charge to the jury and upheld its validity. See Pet. for Certiorari, pp. 7a-10a. Nor was the impact on the jury of this sharp distinction minimized by the judge's subsequent, inadvertent inclusion of General Jolly in an enumeration of the defendants required to act upon probable cause.

Neither was the prejudice of the National Guard charge eliminated by the jury's verdict in favor of the state police defendants. The physical presence of the Guard was not manifest until three hours after the detention had commenced, but thereafter, the detention was enforced solely by the Guardsmen who formed a perimeter around the petitioners lasting until late the next afternoon. As a consequence, the jury may have reasoned as follows: (1) the initial detention, implemented by the civilian law enforcement officials, was reasonable under the Fourth Amendment, (2) the rest of the detention's duration, implemented by the

National Guard, was not based on probable cause, however (3) the court had instructed them that the National Guard could act "in good faith" and did not require probable cause for continuation of the detention. Thus, the instruction complained of was prejudicial, as well as incorrect, and was not cured by the verdict in favor of the other respondents.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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